IN THE

Supreme Court of the United States

October Term 1978

No. 78-5283

JAMES A. JACKSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The State of California has, as have most, if not all, of the other forty-nine states, provided state prisoners with an appellate review system for full and fair hearing of all federal constitutional law claims.

Therefore, amicus curiae is concerned that duplicative federal habeas jurisdiction may be expanded by constitutionalizing the reasonable doubt standard as applied to collateral review of sufficiency of the evidence. It is our opin-

ion that if the "any" evidence standard is replaced by a "reasonable doubt" standard every state prisoner who presented such an issue in his state appeal or on state collateral review will be likely to embrace the federal remedy.

The State of California has been authorized by the Attorney General of South Carolina, the Honorable Daniel R. McLeod; the Attorney General of the State of Alabama, the Honorable Charles A. Graddick; and the Attorney General of West Virginia, the Honorable Chauncey H. Browning, to inform the Court that these states join in this brief and support the position of the Commonwealth of Virginia.

SUMMARY OF ARGUMENT

Amicus curiae contends that the Due Process Clause does not require application of the "reasonable doubt" standard on federal habeas review and that relitigation of all constitutional issues, including whether the evidence is sufficient to comport with due process whatever the standard, should be limited to those cases where defendants did not enjoy a full and fair state hearing.

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ARGUMENT

I. DUE PROCESS DOES NOT REQUIRE FEDERAL RELITIGATION OF STATE SUFFICIENCY OF THE EVIDENCE ISSUES BY APPLICATION OF THE REASONABLE DOUBT STANDARD, THEREBY UNNECESSARILY EXPANDING FEDERAL HABEAS JURISDICTION

A. Federal Habeas Corpus Should Not Be Available To Relitigate Sufficiency Of The Evidence In A State Conviction Unless The State Failed To Provide A Full And Fair Hearing

The instant case arises via the broad federal habeas corpus avenue for state prisoners. It is now apparent that such relief should be limited when the value of the "Great Writ" is weighed against its deleterious effects on the federal-state criminal justice system. (See Stone v. Powell (1976) 428 U.S. 465, 488-489, 494.) On the negative side of the balance is the burden on federal district courts and circuit courts, the lack of finality of any state judgment (even after repetitive state reviews), friction between federal and state courts, a lack of comity, duplicity of review and interference with punishment and rehabilitation of state prisoners. On the positive side of the balance is the possibility that constitutional error, missed or ignored by the state court system, will be ferreted out. This solitary virtue has lost much of its vitality due to the greater competence of the state justice systems,

their increased sensitivity to enforcing federal constitutional rights as mandated in recent years by this Court, and their protection of basic rights by application of their state constitutions. Therefore, federal habeas corpus should again be limited to its essential function--to afford an effective remedy where otherwise there was none. (See White v. Ragen (1945) 324 U.S. 760; Stone v. Powell, supra, 428 U.S. 465.)

A brief review of the modern history of the writ indicates its current role is evolving and in need of further revision and definition.1/

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1. More elaborate discussions of the complete history, purpose and scope of habeas corpus are plentiful: Cover and Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court (1977) 86 Har.L.Rev. 1035-1059; Jaglom, Protecting Fundamental Rights in State Court: Fitting a State Peg to a Federal Hole (1977) 12 Harvard Civil Rights-Civil Liberties L. Rev. 80-85. Compare Fay v. Noia (1963) 372 U.S. 391, 399-426, with id. at 449-63 (Harlan, J., dissenting); compare Developments in The Law--Federal Habeas Corpus (1970) 83 Harv.L.Rev. 1038, 1042-62, 1263-74, and Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding (1961) 74 Harv.L.Rev. 1315, 1324-1332, with Oaks, Legal History in the High Court--Habeas Corpus (1966) 64 Mich. L.Rev., pp. 451,451-458; and Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners (1963) 76 Harv. L.Rev. 441, 463-507. "The scope of federal habeas corpus for state prisoners has

(Footnote continued p. 5.)

In 1953, the Court held that, no matter how fully the state court had considered a federal constitutional issue, that issue could be redetermined by a federal court on habeas corpus. (Brown v. Allen (1953) 344 U.S. 443.) The Court reasoned that the state courts needed supervision to insure conformity in constitutional interpretation. In 1963, the relitigation rule of Brown, which gave a defendant a two-tier appeals system, was inevitably extended by the Court to a prisoner who had failed to litigate his claim in the state justice system. (Fay v. Noia, supra, 393 U.S. 391.) Specifically, the Court held that procedural default by a defendant in state courts will not preclude habeas corpus review unless the petitioner deliberately bypassed the state procedure. (Id. at pp. 426-427, 438.) On the same date, the Court decided Townsend v. Sain (1963) 372 U.S. 293, 312-313, 318, which held that the federal court was not bound by state determination of facts and laid down standards for determining whether a federal evidentiary hearing was necessary.

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evolved from a quite limited inquiry into whether the committing state court had jurisdiction, [Citations omitted.], to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims, [Citation omitted.]; and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions . . . ." Schneckloth v. Bustamonte (1973) 412 U.S. 218, 255-56 (Powell, J., concurring).

Limitation of federal habeas corpus review has been proposed in various bills in Congress to curtail the scope of the writ.2/ The first clear indication that the Court might reconsider the role of federal habeas corpus was Schneckloth v. Bustamonte, supra,412 U.S. 218. The concurring opinion of Justice Powell prophesied his majority opinion in Stone v. Powell, supra, 428 U.S. 465. In the concurring opinion, four justices concluded that: 3/

> " . . . [F]ederal collateral review of a state prisoner's Fourth Amendment claims . . . should be confined solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts." (Id. at pp. 249-250.)

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2. See Paschal, The Constitution and Habeas Corpus (1970) Duke L.J. 605, 606; S.Rep.No. 1797, 89th Cong. 2d Session (1966); S917, 90th Cong., 2d Sess. § 702 (1968); 114 Cong.Rec.11, 189 (1968); H.R. 11, 441, 92d Cong., 1st Sess. (1971); S.567, 93 Cong.; 1st Sess. (1973); The Department of Justice urged habeas reform as part of speedy trial reform. See Hearing on S. 895 Before the Subcom. on Const. Rights of the Senate Judiciary Comm., 92nd Cong. 1st Sess. 93-121 (1971).

3. The concurring opinion actually included four justices, as Justice Blackmun's concurring opinion agreed with Justice's Powell's opinion, except for the necessity of reconsidering Kaufman v. United States (1969) 394 U.S. 217.

As a further response to its recognition of the Brown-Noia expansion costs, the Court questioned the primary elements of Fay v. Noia, supra, in three decisions in the 1975 term.

Estelle v. Williams (1976) 425 U.S. 501, 508-512 challenged the Fay principle of no automatic attribution of counsel's acts or omissions to the client. Francis v. Henderson (1976) 425 U.S. 536 modified the Fay criteria of the "deliberate bypass" standard by adding "cause" and "prejudice" requirements:

> "In a collateral attack upon a conviction that rule requires, contrary to the petitioner's assertion, not only a showing of "cause" for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice." (Id., at p. 542.)4/

Stone v. Powell, supra,428 U.S. 465, the most important of the trio, held that, at least as to Fourth Amendment claims, full and fair litigation of the issues in state courts would have a res judicata effect on federal habeas corpus. (Id., at pp. 481-482.)

The last indication of this Court's growing trust in the ability of

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4. There was a state time limitation for challenge of grand jury composition which the Court honored. (Id. at p. 537.)

state courts to properly apply federal constitutional principles is Wainwright v. Sykes (1977) 433 U.S. 72. In Sykes, the Court confirmed its modification of the "deliberate bypass" standard with a "cause" and "prejudice" standard as to all claims not timely raised. However, it was suggested in the dissent that Sykes extended the Stone v. Powell rule to the Fifth Amendment. (Id. at p. 87 fn. 11 and p. 110 (Brennan, J. dissenting).)5/

Distillation of Stone, Francis, and Sykes to their essence should result in a rule precluding federal habeas review of all constitutional questions except in cases where: (1) there was no full and fair state hearing; and (2) defendant had not waived his objection under state law, unless there was "cause" for the waiver and he had suffered "actual prejudice."

If either of these two factors are present federal habeas review should be available, regardless of the type of constitutional issue. As discussed infra, there is no rational justification for the Stone rule not being co-extensive with Sykes. All of the arguments advanced in Sykes, Stone, Francis and Scheckloth which favor careful exercise of discretionary habeas power, apply with equal force to all constitutional issues. Certainly, the federal courts, on habeas, should not

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5. The Court appropriately did not expressly extend the "full and fair litigation" concept to Fifth Amendment issues as Sykes was a case of waiver like Francis, rather than relitigation as in Stone.

attempt to exercise their power to review state convictions for sufficiency of the evidence, whether "due process" requires "any" or "some" evidence, or whether it requires "beyond a reasonable doubt" as petitioner urges herein (see Argument I. B. infra).6/

We advert first to the factors favoring extension of Stone to all constitutional issues.

The increasing burden of habeas filings on the federal judiciary merits consideration, especially in view of the increased availability of state forums, as detailed infra. Filings numbered 1,020 in 1961 and 9,063 in 1970. The rapid increase, approximately one thousand additional cases annually, in habeas corpus filings in the decade of 1960-1970 seriously clogged the federal courts. Petitions filed by state prisoners continue to represent a significant portion of the workload of the U.S. District Courts. In 1977, the 14,846 state prisoner petitions constituted 11.4% of all civil filings, whereas federal petitions amounted to only

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6. The disagreement between the District Court and the Circuit Court in the instant case as to whether there is "any evidence of premeditation is an indication that state courts are just as capable of deciding such issues.

3.6%.7/

"This Court has long recognized . . . considerations of comity . . ." (Francis v. Henderson, at p. 539; see Fay v. Noia, at pp. 425-426). Federal courts, in the exercise of this habeas corpus power, have traditionally considered "the minimization of friction between our federal and state systems of justice" and "the maintenance of constitutional balance upon which the doctrine of federalism is founded."8/ (Stone v. Powell, supra, 428 U.S., at p. 465, footnote 31, referring to Schneckloth v. Bustamonte, supra, 412 U.S. at p. 259 (Powell, J. concurring), and Kaufman v. United States (1969) 394 U.S., at p. 231.) Al-

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7. Annual Report of the Director of The Administrative Office of the United States Courts (1977) at pp. 188, 189,205; Id. (1971) at. p. II 45; 1971 Hearings on S. 895 Before Subcomm. on Constitutional Rights of the Senate Judiciary Committee, at pp. 97-98; 119 CONG. REC. S1305 (Jan. 26, 1973). See Brown v. Allen, supra, 344 U.S. 443, 532, 536 and n. 8, p. 536.

8. Current procedure allowing a federal district court judge to reopen and possibly overturn the trial decision of a state supreme or other highest court has been attacked over the years as causing needless tensions between the two court systems. Critics complain that it is needless because the state courts are equally bound to the Constitution and equally subject to the decisions of this Court. (Doub, The Case Against Modern Federal Habeas Corpus (1971) 57 A.B.A.J. 323, 327.)

though Justice Frankfurter rejected the notion that federal habeas procedure allows a "lower court" to sit in judgment on a "higher court" (Brown v. Allen, 334 U.S., at p. 510), certainly some state high court justices must disagree.

Another traditional factor in favor of limited exercise of federal habeas jurisdiction is "the necessity of finality in criminal trials." (Stone v. Powell, supra, 428 U.S., at p. 491 fn. 31; Wainwright v. Sykes (1977) 433 U.S. 72, 78.) The lack of finality causes various insoluble problems for state prosecutors and prison authorities: (1) it is difficult to relitigate facts many years after conviction because witnesses may be missing, unable to remember, or unwilling to testify; (2) relitigation of stale facts may produce a second trial where facts are no more reliable than the first (see Williams v. United States (1971) 401 U.S. 646, 691 (Harlan, J., dissenting); (3) "It is of course a commonplace of classical criminal-law theory that certainty and immediacy of punishment are more crucial elements of effective deterrence than its severity" (Bator, Finality In Criminal Law supra, 76 Harv.L.Rev. 441, at p. 452 fn. 21); and (4) the perpetual lack of finality impairs the speed and certainty of punishment essential for effective rehabilitation. (See e.g. 1971 Hearings, supra at note 2; Bator, supra, at

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p. 452;9/

In Wainwright v. Sykes, this Court realistically acknowledged the possibility of "sandbagging":

> "We think that the rule of Fay v. Noia, broadly stated, may encompass 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." (433 U.S. at p. 89.)

That same type of gamesmanship can be played by any state prisoner seeking federal habeas review. Since there is no time limitation on his petition, he can seek federal redress at any time that may be advantageous to him, such as when a crucial witness dies or absents himself or upon loss of important evidence. Obviously, persons on direct review have much less control of the

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9. Professor Bator opines: "The first step in achieving that aim [rehabilitation of offenders] may be a realization by the convict that he is justly subject to sanction, that he stands in . . . need of rehabilitation, and a process of re-education cannot, perhaps, even begin if we make sure the cardinal moral predicate is missing, if society itself tells the convict that he may not be justly subject to reeducation and treatment in the first place." (Supra, 76 Har.L.Rev., at p. 452.)

timing of the processing of their claims.

The cumulative effect of lack of finality, coupled with all the afore-described costs, has now finally tipped the scales in favor of yielding the primary remedy for constitutional error to state process. Balancing the extravagant costs of federal habeas corpus against the protection of individual constitutional rights, Stone should be applied to all constitutional claims, just as Francis-Sykes is, because the state court systems are now capable and willing to protect fundamental rights.

Historically, the expanding availability of the habeas corpus writ was in part due to the state courts' inability to enforce constitutional rights. Professor Bator indicates that the "principal problem" in limiting the scope of federal habeas review in 1963 was the "inadequacy of state procedures for the vindication of federal constitutional procedures." (Bator, supra, 76 Har.L.Rev. 441, at p. 522.) In Brown v. Allen, Justice Frankfurter acknowledged that the primary responsibility for enforcing the Constitution must be with the states, but he supported broad federal habeas jurisdiction only because of the possible insensitivity of some state judges toward the Constitution. (344 U.S., at pp. 510, 511.) While in 1953 and 1963, such a fear was well-founded, today such

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trepidation would be baseless and this "Court's willingness to overturn or modify its earlier views of the scope of the writ" (Wainwright v. Sykes, supra, at p. 81) may now be employed without fear of loss or diminution of the individuals' federal rights.10/

This Court has itself recognized in Stone that state court protection has come of age:

> "The policy arguments that respondents marshal in support of the view that federal habeas corpus review is necessary to effectuate the Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate safeguard. The principal rationale for this view

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10. Mr. Justice Brennan's prediction that broad federal habeas jurisdiction would stimulate the states to devise adequate post-conviction procedures has been fulfilled. (See Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism (1961) 7 Utah L.Rev. 423, 440-441.)

> emphasizes the broad differences in the respective institutional settings within which federal judges and state judges operate. Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. Martin v. Hunter's Lessee, 1 Wheat. 304, 341-344 (1816). Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems. In sum, there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of Fourth Amendment claims] than his neighbor in the state courthouse.' (Bator, supra, n. 7, at 509.)" (428 U.S. at pp. 493-494, fn. 35.)

This expression of trust in state processes in Stone is well based in view of the time state courts have had to digest and apply this Court's decisions of the last two decades, the increasing number of state courts enforcing fundamental rights based on "independent state grounds," and the beginning of a decline in the number of prisoners finding need to resort to federal forums.11/

Perhaps the greatest evidence of the fact that state courts are concerned with fundamental rights, and therefore must be capable and willing to follow the Court's mandate of the last two decades, is their own willingness to exceed those mandates by even more zealous protection. Mr. Justice Brennan recently recognized this phenomena by noting that " . . . numerous state courts

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11. The ability of state courts to develop their bills of rights independently of the Federal Constitution derives directly from the fundamental nature of our dual judicial system. Under article III the jurisdiction of the federal courts is restricted to nine classes of cases. While the federal courts are empowered to review issues arising under federal law, the Constitution grants no authority for the Supreme Court or the lower federal courts to review a state court interpretation of state law. (Eric R.R. v. Tompkins (1938) 304 U.S. 64, 78.) Neither may Congress expand the Court's review authority as set out in article III. (Marbury v. Madison (1803) 5 U.S. (1 Cranch.))

. . . have already extended to their citizens via state constitutions, greater protections than the Supreme Court has held are applicable to the Federal Bill of Rights." (Brennan, State Constitutions and The Protection of Individual Rights (1977) 90 Harv. L. Rev. 489.) Justice Brennan opines " . . . these state courts discern, and disagree with, a trend in recent opinions of the United States Court to pull back from, or at least suspend the Boyd principle with respect to application of the federal Bill of Rights and the restraints of the due process and equal protection principles of the Fourteenth Amendment." (Id., at p. 495.)12/

If the states find it necessary to employ their own bills of rights to expand rights and liberties, a fortiori they must, at a minimum, be willing and competent to conform to federal constitutional requirements imposed by this Court during the last two decades.

The extent of the use of "an adequate and independent state ground" has spread during the last decade. We are aware of at least 19 different state appellate courts which have interpreted their own

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12. The "Boyd principle" refers to Boyd v. United States (1886) 116 U.S. 616, 635: " . . . constitutional provisions for the security of person and property should be liberally construed . . . . It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

constitutions in ways more protective of basic rights than extant or anticipated Supreme Court decisions. 13/ Also, many

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13. Those states are: California (numerous decisions); New Jersey (State v. Johnson (1975) 346 A.2d 66, 68; NAACP v. Mt. Laurel (1975) 336 A.2d 713, appeal dismissed and cert. den., (1975) 423 U.S. 808); Hawaii (State v. Kaluna (1974) 520 P.2d 51); Michigan (People v. Jackson (1974) 217 N.W. 2d 22); South Dakota (Parham v. Municipal Court (1972) 199 N.W.2d 501); Maine (State v. Sklar (1974) 317 A.2d 160); Alaska (Roberts v. State (1969) 458 P.2d 340 and Etheridge v. Bradley (1972) 502 P.2d 146); Delaware (State v. Wolf (1960) 164 A.2d 865); Flordia (State v. Barquet (1972) 262 So.2d 431); Georgia (Nat. Mtge. Corp. v. Suttles (1942) 22 S.E.2d 386 and Carey v. City of Atlanta (1915) 84 S.E. 456); Idaho (Murphy v. Pocatello School District (1971) 480 P.2d 878); Indiana (Speight v. State (1959) 155 N.E.2d 752); Kentucky (Bradshaw v. Ball (1972) 487 S.W. 2d 294 Mass. (Nason v. Superintendent etc. (1968) 233 N.E.2d 908); Mississippi (Tucker v. State (1922) 90 So. 845); New York (People v. Donovan (1963) 243 N.Y.S.2d 841); Oklahoma (Hunter v. State (1955) 288 P.2d 425); Oregon (Portland v. Welch (1961) 364 P.2d 1009; State v. Brown (1972) 497 P.2d 1191, 1196); Rhode Island (State v. Le Blanc (1966) 217 A.2d 471); Texas (Trammel v. State (1956) 287 S.W.2d 487); Utah (State v. Eichler (1971) 483 P.2d 887); and Wisconsin (Gall v. Wittig (1969) 167 N.W. 2d 577). Many of these states have several other decisions based wholly or partially on state constitutional grounds.

state courts, as in their prerogative (Oregon v. Hass (1975) 420 U.S. 714, 719), have imposed, without resorting to their own constitution, greater restrictions on police activity than those the Supreme Court has held to be necessary under federal constitutional standards. 14/

Finally, filing of federal habeas petitions by state prisoners increased by at least one thousand per year from 1962 to 1970, dropped slightly in 1971 and thereafter increased from 1971 to 1976 at a much slower rate, and then dropped again in 1977. (1977 Annual Report, supra, at pp. 188-189, 205.) 15/ The Administrative Office of the United States Courts opined in 1971 that " . . . it is quite likely that the availability of more legal services to state prisoners and the improvements being made in judicial and post-conviction procedure in many states have begun to open other legal routes which prisoners must exhaust before approaching Federal Court." (1971 Annual Report, supra, at p. II-50.) That conclusion is even more unquestionably correct given the state courts' usage of "independent state grounds" and their concomitant capability and willing-

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14. e.g. Wyoming (Croker v. State (1970) 477 P.2d 122); Colorado (Velarde v. People (1970) 466 P.2d 122); Colorado (Velarde v. People (1970) 466 P.2d 919); New York (People v. Kelly (1974) 353 N.Y.S. 111, 117).

15. The 1977 Report at p. 205 notes that state prisoner petitions decreased more than 12% during the present 12-month period.

ness to apply federal constitutional principles.

In addition to the consideration detailed supra, there are other factors that are particularly relevant to the scope of federal habeas jurisdiction with respect to sufficiency of the evidence.

Obviously, if evidentiary sufficiency on habeas review is further constitutionalized, habeas jurisdiction will necessarily be expanded, contrary to the trend of cautious limitation so apparent and so fully justified in Stone, Francis, and Sykes. Justice Stewart recognized that problem in his proposal in Freeman v. Zahradnick (1977) 429 U.S. 1111, 1115: "The approach I suggest would expand the contours of one kind of claim cognizable on federal habeas corpus."

Secondly, constitutionalizing sufficiency of the evidence is in direct contradiction of the limited role of a federal judge when a jury is the trier-of-fact. "Even the trial court, which has heard the testimony of witnesses first hand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal." (Burks v. United States (1977) 437 U.S. 1, 16.) How much more futile it would be for federal judges to pore over state transcripts to determine if the prosecution case was proved beyond a reasonable doubt. Such a retrial-by-transcript would be wasteful exercise:

> "A stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." (Broadcast Music v. Havana Madrid Restaurant Corp. (2nd Cir. 1949) 175 F.2d 77, 80.)

Justices Marshall, Brennan and Powell in their dissent in Swisher v. Brady (1978) ____ U.S. ____, made a perfect case against expanding federal habeas review of sufficiency of the evidence:

> "In a criminal proceeding, where the issue posed is the threshold one of whether a defendant has been proven guilty of a crime beyond a reasonable doubt, the same considerations surely have at least as much force. Indeed, the need for achieving the most reliable determinations of evidentiary facts, and particularly of credibility, exists a fortiori where the factual determinations must be made beyond a reasonable doubt.
>
> "As the Maryland courts have have held, In re Brown, 13 Md. App. 625, 632-633, 284 A.2d 441,

444-445 (1971), and as is self-evident from the structure of Rule 911, the master's function at the hearing is, in large part, to assess the credibility of the witnesses. That function simply cannot be replicated by the 'judge,' acting in his essentially appellate capacity reviewing the record;

"* * *

"But more importantly, when a juvenile seeks to reopen the proceeding before the judge--in order to avoid having a case decided against him on the basis of a cold record in violation of the Due Process Clause--he is being subjected to a second trial of the sort clearly prohibited by the Double Jeopardy Clause." (___ U.S. ___ [98 S.Ct. 2699 at pp. 2714, 2715].) 16/

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16. Of course, if an evidentiary hearing were held in every case, retrying the entire case, assuming the witnesses were available with their full recall, the federal judge would be in a position to assess the evidence. However, such an evidentiary hearing would, at a minimum, violate the spirit of Double Jeopardy. (Burks v. United States, supra, 437 U.S. 1; Green v. Massey (1978) 437 U.S. 19.)

The majority in Sykes also recognized the value of determinations by "the judge who observed the demeanor of the witnesses . . ." (433 U.S., at p. 88).

Assuming the dissent in Swisher is correct in its assessment of the difficulty in judging "reasonable doubt" from a "cold record", another factor against expanding habeas corpus by changing the sufficiency standard is the potential of erroneous decisions without a remedy for the prosecution. Under Burks v. United States, supra, 437 U.S. 1 and Green v. Massey, supra, 437 U.S. 19, if the federal court retries the state case by transcript and determines the evidence was insufficient, then double jeopardy prevents a retrial. 17/ This harsh result cannot be justified considering the substantial likelihood of judicial error in trial-by-transcript.

In conclusion, it seems highly incongruous that under Sykes, the Court has apparently extended federal habeas limitation to all types of claims when a defendant failed to obtain a hearing of the constitutional issue in the state courts, but in cases where issues have been given a "full and fair hearing" only Fourth Amendment claims are precluded from redundant federal habeas litigation. In other words, discretionary habeas power should be even more properly restrained where a state prisoner has had one (state) hearing, than where he has had none. This Court's hostility to duplication and relitigation as expressed in Francis and Sykes, which

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17. As discussed infra, from a cold record it is undoubtedly easier to judge "some evidence" than "beyond a reasonable doubt."

require defendants to raise their constitutional claims in state trial courts, is even more well founded in cases such as this one where the defendant has already litigated his claim in the state court system.18/ For the preclusive con-

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18. Amicus will not attempt to fully brief whether petitioner failed to raise his "constitutional" issue in the state court system or whether he enjoyed a "full and fair hearing." Thorough exploration of that subject is better left to the respondent. However, according to Roundtree v. Riddle (D.C. W.D.Va. 1976) 417 F.Supp.1274, petitioner had the benefit of a "full and fair hearing." The identical state procedure was followed in Roundtree (see p. 1275). Petitioner Jackson appealed his conviction in the Virginia Supreme Court which was fully considered by the Court (according to their recitation) and they found no error (Appendices A & B). Of course, there was no formal oral argument or written opinion. However, it can be argued that petitioner failed to properly raise his "constitutional" issue by waiving his right to orally argue for the granting of his petition. Petitioner's conclusion in his Petition for Writ of Error stated:

> "The attorney for Petitioner adopts this as his opening brief in the event a Writ of Error is awarded, and does not demand to state orally the reasons for granting the petition." (Appendix A.)

Under the pertinent rules (Rule 5.28 of

(Footnote continued p. 25.)

sequences of failure to raise a claim in state proceedings to apply to the entire spectrum of constitutional issues, but the preclusive consequences of fully litigating a claim in state courts to apply only to Fourth Amendment issues, is, at best, inconsistent.

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the Rules of the Virginia Supreme Court), petitioner had a right to appear before one Virginia Supreme Court Justice, which he waived.

It is at least arguable that petitioner falls within Sykes for one other reason. In his brief to the Virginia Supreme Court he complained that Virginia violated Mullaney v. Wilbur (1975) 421 U.S. 684, by requiring him to prove he was too drunk to deliberate and premediate (Appendix A). He did not specifically contend, as he does now, that the state failed to prove premeditation beyond a reasonable doubt. Apparently, the first time he pressed his specific point was in his petition for collateral review in the United States District Court for the Eastern District of Virginia (Petition for Cert. p. 6). Since the Supreme Court of Virginia has never been presented with the constitutional issue herein raised, it would appear that the District Court should have refrained from collateral review a la Wainwright v. Sykes.

In any event, if petitioner's brief to the Virginia Supreme Court presented the issue raised herein petitioner had a "full and fair hearing" (Roundtree v. Riddle, supra, 417 F.Supp. 1274); or, if

(Footnote continued p. 26.)

Both Chief Justice Burger and Justice Powell have indicated their belief that Stone should be extended to other claims. In Brewer v. Williams (1977) 430 U.S. 387, 415-430, the Chief Justice, in dissent, opined that Stone should have barred relitigation of the Massiah-type counsel claim in that case. In Castaneda v. Partida (1977) 430 U.S. 482, Justice Powell, in dissent, opined that Stone should be extended to discriminatory grand jury claims.

It is submitted that a piecemeal approach to the application of Stone is not warranted. A general application could provide more assurance of individual rights than Sykes did because the "full and fair hearing" requirement of Stone insures at least one full litigation of a defendant's claim.

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the brief missed the mark in presenting the instant issue, petitioner should have been precluded from collateral review absent a showing of "cause" and "actual prejudice."

B. The Standard of "Some" or "Any" Evidence on Federal Habeas Review Satisfies Due Process; Application of the Reasonable Doubt Standard Would Constitute Retrial-By-Transcript

Petitioner seeks to use Justice Stewart's single justice dissent in Freeman v. Zahradnick, supra, 429 U.S. 1111, 1112, which suggests the expansion of In re Winship (1970) 397 U.S. 358, to bootstrap himself into an argument that the Due Process Clause requires federal courts on habeas corpus to review cold state records to determine whether any "rational trier of fact could find guilt beyond a reasonable doubt." Petitioner makes this contention notwithstanding the equivocation in the lone dissent; the lack of a fundamental claim; the concomitant expansion of habeas jurisdiction; the fact that such review would constitute trial-by-transcript, and the fact that Patterson v. New York (1977) 432 U.S. 197 and other intervening cases make it abundantly clear that In re Winship was never meant to overrule or in any way modify Thompson v. Louisville (1960) 362 U.S. 199.

Petitioner's contentions are patently fallacious unless due process is to be extended in this area of sufficiency of the evidence, far beyond its bounds elsewhere.

While the term "due process of law" has been "the center of substantial legal debate over the years " (see In re

Winship, supra, 397 U.S. 358, 378 (J. Black dissenting)), broadly interpreted, "due process of law" means fundamental fairness within our system of laws. (See e.g. In re Winship, supra, at 381; Rochin v. California (1952) 342 U.S. 165, 169). Due process of law protects an individual from arbitrary action of the government and action which shocks the conscience by failing to comport with traditional ideas of fair play and decency. (See e.g. Meachum v. Fano (1976) 427 U.S. 215, 226; Breithaupt v. Abram (1957) 352 U.S. 432, 435. "Traditionally, due process has required that only the most basic procedural safeguards be observed . . ." (Patterson v. New York, supra, at p. 210). The question then is whether the traditional "some" or "any" evidence standard on federal habeas review "offends some principle of justice so deeply rooted in traditions and conscience of our people as to be ranked as fundamental." (Id., at p. 202.)

To render a criminal conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment, the conviction must be "totally devoid of evidentiary support." (Garner v. Louisiana (1961) 368 U.S. 157, 163.) As noted by Chief Justice Warren, this Court's due process of law inquiry does not turn on a question of the sufficiency of evidence to support the conviction, but on whether the conviction rests upon "any" evidence

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which would support the finding of guilt.19/ (Id., at 163-164; see also Shuttlesworth v. Birmingham (1965) 382 U.S. 87, 94-95; Thompson v. Louisville, supra, 362 U.S. 199, 204, 206.) Since federal habeas review only involves the requisite aforedescribed due process standard, the probative strength of evidence has never been permitted to be an issue in habeas corpus. (Young v. Boles (4th Cir. 1965) 343 F.2d 136, 138.)

Petitioner's reliance on Justice Stewart's dissenting remarks in the denial of certiorari in Freeman v. Zahradnick, supra, 429 U.S. 1111, is ill-founded. Justice Stewart was apparently only throwing out an idea; he had not decided that the reasonable doubt standard should be introduced into federal habeas jurisdiction:

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19. Chief Justice Warren stated:

> " . . . we hold that the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment. As in Thompson v. City of Louisville, 362 U.S. 199, our inquiry does not turn on a question of sufficiency of evidence to support a conviction, but on whether these convictions rest upon any evidence which would support a finding that the petitioners' acts caused a disturbance of the peace." (Id., at pp. 163-164.)

> "What I am suggesting is simply that the question whether there was sufficient evidence to support a finding by a rational trier of fact of guilt beyond a reasonable doubt may be of constitutional dimension." (Emphasis added, at p. 1115.)

The history of due process as it relates to sufficiency of the evidence and the reasonable doubt standard establishes that the Court has never intended to impose the reasonable doubt formulation on federal habeas review. It is unworkable and not a part of due process; it is only required at the trial level.

Thompson v. Louisville was the first criminal case where lack of evidentiary support was elevated to constitutional proportions.[20] It seems probable that the Court embarked on constitutionalizing the quantitative aspect of evidence

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20. However, a similar analysis by Mr. Justice Black presaged Thompson in Konigsberg v. State Bar (1957) 353 U.S. 252. The Court held that it was a denial of due process for the bar to refuse to certify an applicant for bar admission because he had failed to prove that he was of good moral character. In Konigsberg, as in Thompson, the Court made an independent examination of the sufficiency of the evidence to determine if the adjudicating body was justified in reaching the result it did.

and departing from its historical reluctance to intervene in state fact-finding because of the peculiar facts in Thompson which included no state review, suspected persecution and harassment of petitioner, the fact that petitioner was black, and the uncontested nature of the evidence. (See 80 ALR2d. 1355, 1376.) Review of the quantitative value of evidence requires the Court to determine whether the fact-finder could reasonably infer the ultimate fact of guilt from the sum of the evidence presented by the state. (See Schware v. Board of Bar Examiners (1957) 353 U.S. 232). The "no", "any", or "some" evidence due process standard was confirmed in Garner v. Louisiana, supra, 368 U.S. 157, 163, and Shuttlesworth v. Birmingham, supra, 382 U.S. 87, 94-95.

This standard has not changed since those cases, although petitioner attempts to assert that Winship constitutionalized the reasonable doubt standard for collateral review. Winship merely applied the traditional reasonable doubt standard at the trial level to juvenile proceedings: the standard is "required during the adjudicatory stage of a delinquency proceedings." (Id. at p. 368.) The Court had never before held that the reasonable doubt standard was constitutionally required, even in adult criminal proceedings. (Id., at p. 385 (Black J., dissenting.) The Court did not state or even imply that appellate or collateral review required a finding that the trier-of-fact properly concluded that the standard had been met.

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Four years subsequent to Winship, the Court was presented with an opportunity to apply the Winship rule to federal collateral review in Vachon v. New Hampshire (1974) 414 U.S. 478. Instead, the court, citing Harris v. United States (1971) 404 U.S. 1232, 1233 (Douglas, J., in chambers), Thompson v. Louisville and other cases stated: "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violates[s] due process." (Vachon, at p. 480.) Chief Justice Burger and Justice White, in their dissent, confirmed how limited due process is when applied to sufficiency of the evidence:

> "Even if appellant's sufficiency-of-the-evidence contention in the Supreme Court of New Hampshire could be said to have been presented as a federal constitutional claim based on Thompson v. Louisville [citation], I would nonetheless be unable to join in the Court's disposition of it. In Thompson, the only state court proceedings reaching the merits of the case were in the Louisville Police Court from which there was no right of appeal to any higher state court, and there was therefore no state court opinion written which construed the statute under which Thompson was convicted. This Court therefore had no choice but to engage in its own construction of the

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> statute and upon doing so it concluded that the record was 'entirely lacking in evidence to support any of the charges.' Id., at 204, 4 L.Ed. 2d 654. Thompson was obviously an extraordinary case, and up until now has been saved for extraordinary situations; it has not heretofore been broadened so as to make lack of evidentiary support for only one of several elements of an offense a constitutional infirmity in a state conviction." (At p. 671; emphasis added.)

The statement in the emphasized quote refers to the fact that Justice Douglas in his single justice opinion in Harris v. United States, first grafted on the every element criteria to the Thompson test.21/ The majority in Vachon surprisingly adopted it without explanatory comment. Therefore, it is questionable that the "elements" requirement applies to the Thompson test.

Apart from Vachon, the decisions between Winship and Patterson v. New York, supra, indicate that the reasonable doubt standard is not appropriate or required by

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21. Of course, the Winship case did include similar language with respect to the reasonable doubt standard at the trial level: " . . . of every fact necessary to constitute the crime with which he is charged." (Id. at p. 264, 364.)

due process in appellate or collateral review.

The vitality of Winship at the trial stage was confirmed in Mullaney v. Wilbur (1975) 421 U.S. 684, where the court employed Winship to invalidate Maine's affirmative defense of provocation. The rationale was that to require the defendant to prove provocation by a preponderance of the evidence violated Winship's requirement that the state prove beyond a reasonable doubt "every fact necessary to constitute the crime." Manslaughter was distinguished from murder by the absence of provocation. Therefore, the Court held that at trial, Maine had to prove the absence of provocation beyond a reasonable doubt when the issue was raised by the defense.

Just two years later, however, in Patterson v. New York, supra, 432 U.S. 197, it became clear that Mullaney did not portend further extension of Winship such as to appellate or collateral review. Professor Allen has summed up his opinion why Mullaney should only be considered to be a temporary forage into extending the reasonable doubt standard by use of due process:

> "In his dissent in Patterson, Justice Powell accused the Court of 'drain[ing] In re Winship . . . of much of its vitality.' Justice Powell was wrong. Patterson did not 'drain Winship of its vitality'; rather, it rejected Mullaney's extension of Winship beyond the latter's legitimate

> boundaries, and thus it restored Winship to its original purpose. Careful examination of these three cases shows not only that Patterson rightly rejected the due process analysis employed in Mullaney, but also indicates the proper scope of the federal interest in the reasonable doubt standard.
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> " * * *
>
> "The important point to note about the Winship Court's treatment of burdens of proof in criminal cases is that the Court's due process analysis relied heavily on the common practice in the states and only supported the implications of that practice by reference to the interests protected. The Court attempted no thorough examination of those interests and did not purport to consider fully the states' burden-of-persuasion practices. Indeed, affirmative defenses were never even mentioned by the Court. In Mullaney, by contrast, the Court reversed its order of reasoning, concentrating first on the interests protected by the reasonable doubt standard rather than on whether Maine's statute 'offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental.' This reversal of the analysis in Mullaney was the cause of Patterson's subsequent disavowal of Mullaney, for

it had implications far beyond what Winship could support.

" * * *

"One can now see more clearly the shift of analysis in Mullaney that permitted it to accomplish a result that Winship could not sustain. Mullaney invoked Winship not to invalidate a burden-of-proof practice demonstrably inconsistent with the 'traditions and conscience of our people,' but instead used that case in a fashion that would provide the means to invalidate a practice long accepted throughout the country. Thus Mullaney, which purported to 'apply' Winship, drastically altered that case from one that looks to traditional practice and prevailing usage by the states to aid in due process analysis to one that frees the federal courts to impose their own view about the appropriate use of the reasonable doubt standard on the states notwithstanding widely shared views to the contrary.

" * * *

"Thus, one significant aspect of Patterson is, in short, the restoration of Winship to its original purpose and the concomitant refusal to permit Winship to be misconstrued and then employed as the basis for unjustifiable extensions of federal authority."

(Allen, The Restoration of In re Winship: A Comment on Burdens of Persuasion In Criminal Cases After Patterson v. New York (1977) 76 Mich. L. Rev. 30.)

The recognition in Patterson and Sykes that "common practice" supports findings of constitutionality is nothing more than a reaffirmation that due process is a very limited and basic concept:

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, Irvine v. California, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (Patterson, at pp. 201-202.)

The Patterson opinion is careful to specifically limit the parameters of the Due Process Clause as it was employed in Mullaney:

"There is some language in Mullaney that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability.' . . . The Court did not intend Mullaney to have such far-reaching effect." (Footnote 15, at pp. 214-215.)

Petitioner attempts to argue that since federal judges must apply the reasonable doubt standard on motions for acquittal they are fully equipped to do so on collateral review of state convictions (Petition for Certiorari p. 17). Petitioner cites United States v. Taylor (1972) 464 F.2d 240, the case where the circuits achieved uniformity in the standard they apply. Chief Judge Friendly, quoting from another case, stated the uniform rule:

"The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if

there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter." (Id., at p. 243.)

The crucial point which petitioner omits, or fails to comprehend, is that Winship may require such criteria on motion for acquittal because the proceedings are during trial. (Taylor, at p. 242.) Even if Winship does not compel the judge to apply the reasonable doubt standard, it can be easily applied by the trial judge because he is not working with a cold record, but has presumably heard the testimony first hand.22/

The dissenters in Swisher v. Brady, supra, ____ U.S. ____ (98 S.Ct. 2699), thoroughly explored the difficulties of judges applying the reasonable

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22. This Court recently reiterated the rule that "[e]ven the trial court, which has heard the testimony of the witnesses first hand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal [citations omitted]." (Burks v. United States, supra, at p. 16.) Realistically, a trial judge cannot help but consider credibility and weight.

doubt standard to cold records made by juvenile hearing masters (see Argument I.A). Certainly, the reliability of determinations of evidentiary facts is more in question where a federal judge is reviewing a state record, sometimes decades old. It may be almost impossible for the judge to determine with any certainty on such a record whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. In comparison, it was much easier in Swisher for a judge to review a master's fresh record.

Finally, as discussed supra, the burden on the federal court system would be overwhelming. The issue of sufficiency of the evidence necessarily involves a reading and understanding of the entire record. The higher standard proposed would require even more careful consideration of the record and almost all state appeals involving the sufficiency of the evidence would be presented to federal courts. This second sufficiency review would certainly double the current federal habeas workload, if not in filings, certainly in man hours.

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CONCLUSION

For the foregoing reasons amicus curiae State of California joins respondent Commonwealth of Virginia in urging that the judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

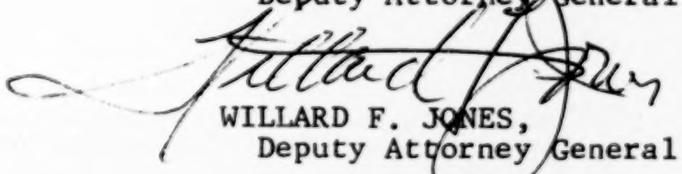
Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General

JACK R. WINKLER, Chief Assistant
Attorney General-Criminal Division

ARNOLD O. OVEROYE,
Assistant Attorney General

EDDIE T. KELLER,
Deputy Attorney General



WILLARD F. JONES,
Deputy Attorney General

JANE K. FISCHER,
Deputy Attorney General

WFJ:mls/mt
79US0004
2-13-79

APPENDIX A

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

No. _____

COMMONWEALTH OF VIRGINIA, Appellee,

v.

JAMES A. JACKSON, Appellant.

PETITION FOR WRIT OF ERROR
TO THE
CIRCUIT COURT OF
CHESTERFIELD COUNTY,
VIRGINIA

MACK T. DANIELS, ESQUIRE
4401 Old Hundred Road
P. O. Box 580
Chester, Virginia 23831

IN THE SUPREME COURT OF VIRGINIA

JAMES A. JACKSON, Plaintiff in Error,

v.

COMMONWEALTH OF VIRGINIA, Defendant in Error.

PETITION FOR WRIT OF ERROR

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

Your Petitioner, James A. Jackson, represents that he is aggrieved by a final judgment of the Circuit Court of the County of Chesterfield, Virginia, entered August 21, 1975, as a result of a trial without the intervention of a jury, whereupon the Petitioner was convicted of murder in the first degree and had imposed upon him a sentence of thirty (30) years in the Virginia State Penitentiary.

MATERIAL PROCEEDINGS IN THE LOWER COURT

On March 27, 1975, Petitioner was tried on a plea of not guilty, without intervention of a jury, before the Honorable Ernest P. Gates. Judge of the Circuit Court of Chesterfield County, Virginia, upon an indictment charging him with the murder of Mary Huston Cole. The evidence consisted of testimony from various witnesses on behalf of the Commonwealth as to the relationship between Petitioner and the deceased and their respective physical conditions on the evening deceased was last

seen alive. Also, evidence on behalf of the Commonwealth in the form of medical examiner's reports, ballistic expert testimony, photographs, and a .38 caliber pistol identified as belonging to Petitioner, with which he had been seen prior to the death of the decedent. After the evidence was in, the Court found Petitioner guilty of first degree murder and ordered a pre-sentence report which was introduced on August 21, 1975, whereupon Petitioner was sentenced to thirty (30) years in the Virginia State Penitentiary. Then Petitioner, by counsel, moved the Court to set aside the judgment on the grounds that the judgment was contrary to the law and the evidence.

ASSIGNMENTS OF ERROR

That the trial court erred in finding and refusing to set aside its judgment as contrary to the law and the evidence in that unwarranted inferences were drawn by the Court from the Commonwealth's evidence, and that the Court erred in failing and refusing to grant a new trial, the motion for which was made on the ground that the Petitioner's conviction was contrary to the law and the evidence.

QUESTIONS INVOLVED

Whether the trial Court erred in finding the Petitioner guilty of first degree murder in light of the evidence introduced on behalf of the Commonwealth, and on unwarranted inferences drawn from this evidence.

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STATEMENT OF FACTS

On August 26, 1974, a warrant was issued in Chesterfield County, Virginia, charging James A. Jackson with the murder of Mary Huston Cole on August 24, 1974. Your Petitioner, James A. Jackson, was subsequently arrested in Fayetteville, North Carolina, waived extradition and was brought back to Chesterfield County, Virginia. On March 27, 1975, trial was held, without intervention of a jury, before the Honorable Ernest P. Gates, Judge of the Circuit Court of Chesterfield County, Virginia, upon the Petitioner's plea of not guilty.

Witness of the Commonwealth, Sally Cole, testified that Petitioner and her husband had several bottles and went to the store and came back with two six-packs (TR 33-37).

Curtis Cole, witness for the Commonwealth, testified that Petitioner had been drinking and was pretty well loaded (TR 55-57).

David A. Andres, Deputy Sheriff, Chesterfield County, testified that he and two police officers, in uniform, had seen deceased and Petitioner shortly before decedent's death; that both were drinking and Petitioner was in pretty rough shape (TR 65-66). That Petitioner had the pistol identified as Commonwealth's Exhibit 1. That Andrews gave the pistol back and observed butcher knife in decedent's car (TR 68). That Andrews wanted to get them outside the diner because they had been drinking and she was

a fellow employee (TR 69). Andrews was asked if they were loaded and he replied that Petitioner was. Andrews stated he then asked Petitioner to let him keep the gun but was told they were going home, so Andrews told deceased to drive because Petitioner was too drunk (RT 72). Andrews also testified that the couple indicated to him that they were going to engage in sexual activity and laughed about it (TR 73).

Mark E. Wilson, detective for Chesterfield County Police Department, testified that he later found, at the scene where deceased was found, six shell casings later identified as having come from Petitioner's pistol. Also introduced through this witness was a statement by Petitioner as to what had happened after leaving Deputy Sheriff Andrews, a color photograph of deceased, numbered Commonwealth's Exhibit 9 but designated Number 8 in transcript, the autopsy report, Commonwealth's Exhibit 13 showing probable cause of death, no trauma, skull normal and no fractures, along with an unnumbered exhibit of laboratory report showing deceased's blood alcohol content of 0.17 by weight by volume.

Petitioner's statement, testified to by Wilson, stated that he and deceased rode to the churchyard (where she was found) and that she wanted to have sex with him, that he didn't want to, that an argument ensured, that she tried to stab him with the knife that Andrews had seen, and that he shot five or six times into the ground, and that he reloaded and when she tried to take the gun from him, "that's when it happened" (TR 90). Petitioner's

statement to Wilson was also that he and deceased had consumed "a fifth of Old Crow, a fifth of Wild Turkey and a pint of ___", and they bought two six-packs of beer (TR 92).

At the conclusion of the evidence the Commonwealth's Attorney argued that it was a case of second degree murder (TR 111-112).

However, the Court observed the color picture, Commonwealth's Exhibit 9, and refered to the mutilation, which was never referred to in the autopsy report (TR 115, line 16). Again (TR 115, line 21) the Court said it was a very horrible looking picture. Again at line 25 the Court said, "look at the face".

The Court indicated (TR 116, line 12) that if the Petitioner were drunk he would have been arrested.

Whereupon Petitioner was found guilty of first degree murder and a pre-sentence report was ordered.

On August 21, 1975, a pre-sentence report was introduced and the Commonwealth's Attorney based his argument for punishment on a previous jury verdict of thirty years in the State Penitentiary in a different and dissimilar case (TR 121); whereupon the Judge followed this argument and sentenced Petitioner to thirty (30) years in the Virginia State Penitentiary (TR 125). Whereupon, counsel for Petitioner moved to set aside the judgment as being contrary to the law and evidence, which motion was denied and excepted to.

ARGUMENT

Petitioner contends that statements made by the trial judge show that the evidence on behalf of the Commonwealth was either excluded from consideration (i.e., evidence of Petitioner's drunken condition), or that unfounded inferences were drawn by the trial judge from other Commonwealth's evidence (i.e., Commonwealth's Exhibit 9).

While it is conceded that the Commonwealth's evidence does not fix the time of decedent's death, the use of the statement made by Petitioner as to events leading up to shooting led one to infer that it happened shortly after Petitioner and deceased left the company of Deputy Sheriff Andrews on August 24, 1974. Since it is the only credible, uncontradicted evidence as to when the shooting took place, Petitioner contends that the Court was bound by it. There was no indication by the Court that its decision was based on the possibility that by the time of the shooting, Petitioner had become sober; the contrary indication was given by the Court that if Petitioner were drunk he would have been arrested by Andrews (TR 116, line 12). This inference is in direct conflict with Andrews' testimony that Petitioner was "loaded" (TR 72) and that Petitioner was too drunk to drive. Since the Commonwealth's evidence showed that Petitioner was drunk shortly before the shooting, Petitioner contends that to require him to actually prove that he was

too drunk to deliberate and premeditate, as required for first degree murder in Virginia (Johnson v. Commonwealth, 135 Va. 524), would be in direct conflict with the Due Process Clause of the Fourteenth Amendment to the United States Constitution as applied in Mullaney v. Wilbur, 95 S. Ct. 1881 (1975).

Commonwealth's Exhibit 9 shows the condition of deceased some time after death. The trial court, without any evidence whatsoever, and indeed contrary to the other evidence, infered that deceased's face had been mutilated (TR 115, line 16). Under no theory can this inference be allowed to stand. Since deceased was found face down (Commonwealth's Exhibits 2 through 7), the blood sepage and discoloration were natural processes.

This case does not involve a situation wherein all evidence was considered and resolved in favor of the Commonwealth, but a situation wherein the trial court openly disregarded the evidence in favor of unwarranted inferences, thereby convicting and sentencing Petitioner according to a jury verdict in a different, unrelated case, all of which is contrary to the law in this Commonwealth and the evidence in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Error should be allowed to the judgment of the Circuit Court of the County of Chesterfield, Virginia, entered in this cause on the 21st day of August, 1975, and that the judgment then entered should be reviewed and reversed by this Court.

The attorney for Petitioner adopts this as his opening brief in the event

a Writ of Error is awarded, and does not demand to state orally the reasons for granting the petition.

Pursuant to Rule 5:22 of this Court, your Petitioner is James Alex Jackson; his attorney is Mack T. Daniels, 4401 Old Hundred Road, Chester, Virginia; the respondent is the Commonwealth of Virginia; and the attorney for the Commonwealth of Virginia is Oliver D. Rudy, Commonwealth's Attorney for Chesterfield County, Virginia. There is no other party of interest in the present action.

This petition will be filed in the Clerk's Office of the Supreme Court of Virginia, at Richmond, Virginia, on December 15, 1975.

I certify that on the 12th day of December, 1975, before filing, a copy of this petition was mailed to Oliver D. Rudy, Commonwealth's Attorney for Chesterfield County, Virginia, counsel of record for the Commonwealth of Virginia in this case.

JAMES ALEX JACKSON

By_____
Appointed Counsel

MACK T. DANIELS, ESQUIRE
4401 Old Hundred Road
P. O. Box 580
Chester, Virginia 23831

I, the undersigned Attorney at Law, practicing in the Supreme Court of Virginia, do hereby certify that, in my opinion, the said verdict and conviction complained of should be reviewed and reversed by this Honorable Court.

MACK T. DANIELS

INDEX

CITATIONS

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 10th day of February, 1976.

The petition of James A. Jackson for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Chesterfield County on the 1st day of August, 1975, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, both reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said court, which court shall allow court-appointed counsel the sum of $100 as compensation for services rendered on this appeal, and also his necessary direct out-of-pocket expenses.

And it is ordered that the Commonwealth recover of the plaintiff in error the said amount paid counsel appointed to represent him on this appeal, his necessary direct out-of-pocket expenses, the costs to be taxed by the clerk of this court, the amount paid counsel appointed by the courts below to represent the said petitioner therein, his necessary direct out-of-pocket expenses, and the costs to be assessed in this case by the said courts below.

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A Copy,

Record No. 751474

Teste:

Howard G. Turner,
Clerk

By:

Deputy Clerk

Costs due the Common-Wealth by plaintiff in error in Supreme Court of Virginia:

Attorney's fee	$100.00 plus his costs and expenses
Filing fee	1.50

Teste:

Howard G. Turner, Clerk

By:

Deputy Clerk